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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State,

and

HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

v.

JAMES NEWKIRK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether a prisoner whose transfer from a medium to a maximum security institution in response to his conduct substantially alters the conditions of his

confinement is entitled as a matter of due process to notice and an opportunity to be heard.

2. Whether, given petitioners' failure to alter the practices that led to respondent's transfer leaving him subject to future summary transfer, and the possibility of future adverse consequences based on the initial transfer, this case can be deemed moot.

STATEMENT OF THE CASE

In July, 1972, this action was commenced in the district court by James Newkirk and three other New York State prisoners. The complaint alleged that on June 8 and 9, 1972, Newkirk and his co-plaintiffs were transferred by petitioners from Wallkill, a medium security institution, to various maximum security prisons without notice of charges and an opportunity to be heard, in violation of the Fourteenth Amendment. Plaintiffs prayed for declaratory and injunctive relief, including expungement from their prison records of any mention of the transfer. Shortly before trial, plaintiffs amended their complaint, adding the claims that their First Amendment rights were chilled and their right of access to the courts diminished by reason of their transfers, and that they were denied equal protection of the laws by being deprived of administrative hearings afforded inmates facing disciplinary punishments.

Trial commenced on November 27, 1972, and the district court heard extensive testimony from Newkirk and Cornelius Lucas, the remaining plaintiffs[1], and two

[1] Prior to trial, plaintiffs Carl Oliver and David Rodriguez were paroled and their cases were dismissed as moot.

other witnesses on their behalf. Petitioner Butler testified as did Walter Dunbar, a former Deputy Commissioner of Correctional Services. Depositions of various officials at Wallkill, and of one inmate, Warren Barnes, were also made part of the record.

The testimony focused on three areas: conditions at Wallkill and Clinton, the prisons involved in Newkirk's transfer; the events at Wallkill that precipitated the transfer; and the circumstances of the transfer itself.

Conditions at Wallkill and Clinton.

In the New York State prison system Clinton is classified a maximum security prson and Wallkill one of medium security (7 NYCRR § 00.15 and § 100.30). Wallkill does not receive men committed directly from the courts (A.195). Rather, inmaes attain admittance by achieving a good record at maximum security institutions and successfully conpleting a selection process which includes personal interviews (A.139, 195). More prisoners apply to Wallkill than can be accomodated; Newkirk was not accepted until six years after his application (A.139, 6-8)[2].

Once admitted to Wallkill, an inmate generally remains there for the balance of his sentence (A.139). In the year and a half prior to trial, only eighteen inmates were involuntarily transferred because of unsuitability for Wallkill (A.50). Most of these transferees received a hearing since as petitioner Butler

[2] During the six-year wait, Newkirk was interviewed several times by Wallkill officials and maintaned a good record at various maximum security prisons (A.6). He even applied for a transfer from one maximum security pison to another because he was told that this would facilitate his acceptance at Wallkill (A.7, 32).

stated, "if they are unsuitable, we usually bring disciplinary charges against them" (A.50). The transfer is entered on the inmate's prison record and considered by the Parole Board (A 143, 214; N.Y. Corr. Law § 214).

The district court found that the "advantages of [Wallkill] over other correctional facilities are numerous" and that conditions at Clinton "contrast strikingly with those in Wallkill." (Pet. for Cert. 41, 36). There are far fewer restrictions and physical restraints at Wallkill (A.47-49, 139, 143, 152-155). Unlike Clinton, it is without a solid outer wall, locked metal gates or barred cells (A. 10, 13, 16, 20, 47, 154, 178). Inmates live in rooms, the doors to which are not locked (A. 154-155). They are free to decorate their rooms and use them for socializing and are allowed free access to bathroom and shower facilities at the end of the floor (A. 16, 18-20). Wallkill is "completely open" until 11 P.M., and inmates may select activities and move unescorted about the institution (A. 47-48). At Clinton, Newkirk was not permitted such freedom of choice or movement (A. 16).

As explained in the descriptive pamphlet about Wallkill issued by petitioners, "the lack of physical and mechanical barriers are compensated for by more accurate classification, individualized treatment, good management . . . and development in the inmate of a sense of personal responsibility" (A. 123, 196). It further states that in "order to achieve the aims for which the Wallkill Correctional Facility was organized, an extensive program has been developed" (A. 196). Thus, the courts below found that Wallkill "gives access to numerous recreational and rehabilitative programs

not available at other state correctional facilities" (Pet. for Cert. 22). And Superintendent Butler testified that the object of Wallkill's programs is to prepare persons for their release from prison by developing individual responsibility, and to reduce the recidivism rate by teaching skills and techniques that are necessary for an inmate to succeed outside prison (A. 123-124).

While at Wallkill, Newkirk attended classes and received on-the-job training in auto mechanics, a vocation he intended to pursue upon release (A. 8-10). He also spent several hours daily practicing musical instruments, played in the band and engaged in art work (A. 13-16, 18). At Clinton, these activities were denied him, and despite his request for work as an auto mechanic or truck driver, he worked instead as a housekeeper for the prison superintendent on a seven day a week, fourteen hour a day schedule (A.11-13, 15, 18, 36, 40-41, 43).

Other conditions of Newkirk's confinement were markedly altered by his transfer. As Clinton is 300 miles from New York City, it became impossible for his family to visit him as they had at Wallkill located only 80 miles from the city (Pet. for Cert. 24). He was even unable to phone them as he had every two weeks at Wallkill (A.20-21). For the first thirty-three days after arrival at Clinton, he was denied every vocational, educational and recreational program, and was locked in his cell for twenty-three hours a day (A.10, 25, 36). For two months thereafter, he received wages amounting to half what he had earned at Wallkill (A.25, 36).

Events at Wallkill.

On June 2, 1971, during a period when inmates were allowed to freely congregate, authorization forms for an

inmate labor union were circulated and Newkirk was given one by Martin Sostre, a fellow inmate (A.26, 152, 156). Later that day, Newkirk signed the form and gave it to another inmate to return to Sostre (A.26-27). Newkirk had nothing further to do with the form and at no time did he participate in discussions or arguments about the union (A.27-29).

The forms were circulated openly and with the full knowledge of Butler and his staff (A.26-27, 54, 156). The circulation was neither violative of prison rules nor unprecedented (A.61, 71, 142, 167). It was not a matter of great concern to Butler or Lieutenant Connolly, the supervisor on duty (A.62, 156-157, 167).

There was little reaction to the circulation of the form until members of the Inmate Liaison Committee expressed "surprise" and "concern" (A.159-161, 165)[3]. To express their disagreement they requested use of the prison's public address system (A.54, 164-165). After approving the text of the announcement, Butler permitted it to be broadcast (A.63, 65, 77). The announcement included an invitation for those interested in further discussion to immediately assemble in a specified room (A.27, 171). The main concern of those who assembled was that the signers of the union forms would suffer reprisals from the prison administration (A.180-182). This gathering, which Newkirk did not attend, dispersed voluntarily and did not disrupt the routine of the prison (A.171-172).

[3]The Liaison Committee was a group of elected inmates who could present certain types of grievances to the administration. Members could be removed at will by Butler (A. 124-125, 128).

The Transfer.

Butler had left Wallkill prior to the circulation of the union forms on June 2 and did not return until June 5 (A.54-55). By the morning of June 7, he had decided to transfer five persons, including Newkirk (A.100-101, 110). He testified that the persons selected were those involved with the circulation of the union "petition" on June 2 and 3 who had remained very vociferous in support of the union on subsequent days (A.90-93, 100, 137). Butler did not personally know which inmates were continuing to "vocally support" the union, and Newkirk's assertion that he was not involved was uncontroverted by Butler or anyone else (A. 62, 64, 77, 84-85, 95-100).

In deciding whom to transfer, Butler relied on the recommendations of Assistant Superintendent O'Mara (A. 95-98, 208-211). O'Mara also had no first-hand knowledge, and listed for transfer those persons whom he believed active in circulating the forms on June 2 and 3 (A. 191-194). Butler received the list from O'Mara on June 6 (A. 94) and without speaking to him or anyone else decided to transfer the first five inmates listed, including Newkirk (A. 94-96, 113, 115, 136-137). It was soon discovered that at least one mistake had been made as a result of this process. Butler admitted on cross-examination that had a more careful investigation taken place concerning David Rodriguez, his transfer might not have occurred (A. 117).

On June 9, while Newkirk was engaged in his usual truck-driving routine, he was summoned to the prison hospital, where he remained confined in a small room

until his transfer later that day (A. 29-30).[4] The transfer, which was unaccompanied by any explanation, came as a complete surprise to Newkirk (A. 29-30). He had adjusted well to Wallkill, was participating fully in its programs and had an excellent disciplinary record (A. 23, 111-112). He had never been told that any aspect of his behavior was objectionable (A. 23, 39, 136), and Butler himself admitted that Newkirk had never created any problems at the institution (A. 23, 39, 134, 136).

At the close of trial, Newkirk and Lucas were returned to Wallkill, while the parties discussed settlement. Agreement was tentatively reached upon a consent order (A. 236). However, concluding that any such order would "stigmatize" Butler (A. 243), petitioners declined to sign a consent judgment and moved instead to dismiss respondent's case as moot.[5] Because petitioners refused to alter their transfer practices at Wallkill,[6] or concede that the failure to afford Newkirk an opportunity to be heard prior to his transfer had been erroneous, Newkirk adhered to his

[4] This was the usual procedure used in transferring an inmate from Wallkill. "[T]his procedure is followed to prevent inmates from barricading themselves in their cells or encouraging fellow inmates to assist them in preventing the transfer (A.53)." (Pet. Brief 13). Butler admitted that there are rooms or cells at Wallkill that can be locked and used to confine a disruptive inmate (A.139).

[5] Lucas' counsel agreed to the dismissal of his case since he had been paroled on February 22, 1973.

[6] There had been a number of summary transfers from Wallkill since Newkirk's return (A.228).

claim for declaratory and injunctive relief.[7] In addition, although petitioner Butler unilaterally placed a memorandum in Newkirk's file explaining the "entirely administrative" nature of Newkirk's transfer (A. 256), respondent sought a judicial decree ensuring that the transfer would not have future adverse consequences.[8]

On October 9, 1973, the district court rendered its decision granting Newkirk declaratory relief, holding that his interest in remaining at Wallkill was sufficiently great to require notice and an opportunity to be heard prior to transfer, and that transfers from Wallkill to maximum security institutions are used for disciplinary purposes (Pet. for Cert. 34-44).[9] The court's judgment of October 26, 1973 decreed that Newkirk could not be transferred in response to his activity without notice and an opportunity to be heard, that no adverse action be taken against him because of his transfer and that he be apprised of what behavior was permissible at Wallkill and the circumstances which, in petitioners' opinion,

[7] In an affidavit in opposition to petitioners' motion to dismiss the case as moot, Newkirk noted that shortly after his return to Wallkill he was threatened by a Deputy Superintendent with re-transfer and stated that his transfer had made him reluctant to engage in any conduct that might lead to another such transfer (226-227).

[8] Newkirk becomes eligible for parole in July, 1975.

[9] The court did not believe there was a sufficiently great threat of transfer at the time of its decision to warrant granting the injunctive relief sought by respondent (Pet. for Cert. 43). Also, because the court found that a violation of respondent's Fourteenth Amendment rights had occurred, it did not consider whether there had also been a violation of his First and Sixth Amendment rights.

would warrant his transfer to another prison (Pet. for Cert. 32-33)[10].

On June 3, 1974 the court of appeals affirmed the holding that Newkirk was entitled to minimal due process prior to transfer from a medium to a maximum security institution, but reversed as to the requirement that he be apprised of all the possible grounds that could lead to a transfer (Pet. for Cert. 21). In December, 1974, Newkirk was transferred from Wallkill to the Edgecombe Correctional Facility, a minimum security facility located in New York City and under the jurisdiction of petitioner Preiser.

SUMMARY OF ARGUMENT

I.

A prisoner is entitled to due process safeguards upon a major change in the conditions of his confinement resulting in grievous loss. *Wolff v. McDonnell*, 418 U.S. 539, n.19 (1974). Finding of the requisite loss in the instant case was based on significant deprivations suffered by James Newkirk in every major aspect of his confinement upon his transfer from Wallkill to a higher security institution. Petitioners' attempt to minimize these deprivations ignores New York's intent that lower

[10]After judgment had been entered, petitioners asked the district court to resettle its order to avoid any misconception that it applied to other than "disciplinary" transfers. The court denied the request, stating that the judgment was sufficiently clear and narrowly drawn.

security institutions such as Wallkill prepare inmates for a constructive life in society by affording significantly greater personal liberties and rehabilitative opportunities than maximum security prisons.

In objecting to the decision below, petitioners greatly exaggerate its scope and effect, and ignore their own present practices. Respondent takes no issue with the state's right to classify inmates for its various institutions, nor with its power to move them throughout the prison system. It is only when the state acts to deprive an inmate of the benefits of a medium security institution on the basis of his conduct that due process is required. It has been consistently recognized by this Court that deprivations based on findings about conduct require procedural safeguards. *E.g. Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). The lack of such safeguards in the instant case resulted in erroneous findings and unnecessary transfers.

Petitioners' contention that due process is only required when they choose to bring "disciplinary charges" against the inmate arbitrarily and irrationally discriminates among prisoners. As recognized by the court below, "Classification by label (e.g. as "administrative' or 'disciplinary') may facilitate prison administration but it cannot be used as a substitute for due process" (Pet. for Cert. 26).

Petitioners' further objections that affording due process prior to transfer may be detrimental to institutional security and will create an insurmountable administrative burden are without merit. Both New York State and the federal prison system presently require notice and a hearing for persons transferred in response to a wide variety of activities, with no

apparent difficulty. The holding below would require such procedures in few additional cases.

II.

The factors this Court has relied upon in finding mootness when declaratory relief is sought are not present here. There is a distinct possibility that Newkirk, still a New York prison inmate, will be subjected to another summary transfer to a higher security prison since petitioners have never indicated an intention to alter the practices which led to Newkirk's initial transfer or assured him that he would be afforded an opportunity to be heard prior to another transfer. Newkirk's awareness of his continuing vulnerability to summary transfer based on "mere rumor or surmise" has made him reluctant to engage in any conduct which might conceivably lead to another transfer and indicates that the past transfer by petitioners has a current impact upon Newkirk. Further, the fact that Newkirk's transfer to a maximum security prison, which is entered in his prison record and considered by the Parole Board, may result in adverse consequences in the future precludes a finding of mootness. Rather than being moot, this case presents an example of a situation in which declaratory relief is essential for in its absence Newkirk must act totally at his peril.

ARGUMENT

I.

A PRISONER WHOSE TRANSFER FROM A MEDIUM TO A MAXIMUM SECURITY INSTITUTION IN RESPONSE TO HIS CONDUCT SUBSTANTIALLY ALTERS THE CONDITIONS OF HIS CONFINEMENT IS ENTITLED AS A MATTER OF DUE PROCESS TO NOTICE AND AN OPPORTUNITY TO BE HEARD.

It is by now fundamental that imposition of grievous loss pursuant to governmental action requires due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Haines v. Kerner*, 404 U.S. 519 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Preiser v. Rodriguez*, 411 U.S. 475 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In terms of prison life, grievous loss is understood as a major change in conditions of confinement. *Wolff v. McDonnell*, 418 U.S. 539, n.19 (1974).

Newkirk's transfer from Wallkill to Clinton was, by virtue of the vast differences between the two institutions, a most grievous loss under constitutional standards. The findings of the courts below established that life at Clinton, a maximum security institution, was substantially worse than at Wallkill, a medium security facility, in the following areas: (1) physical restraints, including barred cells, outside walls, armed guards and crowded conditions; (2) liberty of movement and amount of free time; (3) rehabilitative

opportunities, including vocational training in marketable jobs; (4) recreational and programmatic activities; and (5) basic amenities. Respondent's transfer also resulted in his placement in segregation for 33 days, an inability to continue training in auto-mechanics, a substantial reduction in wages, a total loss of family visits, and a potentially adverse effect on early parole release.

Finding of the requisite loss in the instant case was based, then, on significant deprivations suffered by Newkirk in every major aspect of his confinement. Where similar losses have occurred as a result of transfer to a higher security facility courts have uniformly held that due process is required. *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Walker v.* [illegible] ___ F. Supp. ____ (E.D. Mich. December 12, 19[illegible] *remand from* ____ F.2d ____ (6th Cir. September 26, 1974); *Stone v. Egeler*, 377 F. Supp. 115 (W.D. Mich. 1973); *Aff'd* ____ F.2d ____ (6th Cir. Nov. 15, 1974) *White v. Gilman*, 360 F. Supp. 64 (S.D. Ia. 1973)[11]. The National Advisory Committee on Criminal Justice

[11]The dicta from *Bundy v. Cannon*, 328 F. Supp. 165 (D.Md. 1971), cited in petitioners brief at 28, are based on the discredited "right-privilege" distinction. *E.g. Morrissey v. Brewer*, 408 U.S. 471 (1972). The fact that being placed at Wallkill is not a "right" does not eliminate the need for due process before removal. Moreover, once admitted to Wallkill an inmate generally remains until completion of his sentence or—as he is told—until he violates institutional rules; Newkirk had a legitimate expectation of remaining at Wallkill until release from custody. Cf. *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Standards and Goals has also recommended that hearings be held when changes in custody levels are involved, recognizing that "decisions of this kind can have a critical effect on the offender's degree of liberty, access to correctional services, basic conditions of existence within a correctional system, and eligibility for release". [National Advisory Committee on Criminal Justice Standards and Goals, *Corrections*, Standard 2.13, at 54-55 (1973)].

Petitioners' attempt to minimize the deprivations suffered by Newkirk flies in the face of New York's intentional gradation of its penal institutions. Pursuant to this scheme[12], all adult male felons are initially committed to a maximum security institution such as Clinton[13]. These prisons fit the common stereotype of the penitentiary in terms of size, physical plant and regimentation of inmate life. It is the very limitation of such institutions in contributing to the rehabilitation of those in custody that has led New York to establish its

[12]7 NYCRR § 100.1 – 100.94.

[13]7 NYCRR § 103.1 – 103.40.

continuum of maximum security to lower security to parole status[14].

As a lower security institution, Wallkill's primary aim is to increase an inmate's chances for a constructive life in society by affording innovative programs designed to impart necessary skills, and by developing a greater sense of responsibility through exposure to a less restrictive, less coercive environment than exists in maximum security prisons[15]. The rigorous selection process for determining that only appropriate inmates

[14]As stated by New York State prison officials "regimentation and overcontrol in mass congregate facilities are in most cases not conducive to rehabilitative efforts, and at times might prove to be unnecessary and even a regressive influence on a particular offender". State of New York, *Multi-Year Master Plan of the Department of Correctional Services*, I-12 (April 1, 1973). Further, "[I]t has long been known to correctional administrators that maximum security is not necessary for many inmates and that to place inmates in a maximum security setting compounds the problem of operating rehabilitative programs . . ." State of New York, Select Committee on Correctional Institutions and Programs, *Report No. 2*, at 12 (March 15, 1972). The Select Committee pointed out the anomaly of the situation in New York State where 13,000 inmates are "in maximum security with all sorts of devices and procedures for security and prevention of escape, but one third of these will be paroled to release in the community each year." *Report No. 2* at 12. Copies of these reports are on file in the Clerk's office.

[15]"The continuum concept is based on the realization that the re-entry into the real world of family, friends and job and all the other pressures of daily life is actually the most crucial transition and test put to the offender." *Multi-Year Master Plan, supra*, n.14 at S-5. Also see American Correctional Association, *Manual of Correctional Standards*, 17-18 (1971).

are chosen for Wallkill evidences the importance attached by the state to placement at this facility. Thus, a move between Wallkill and a maximum security institution is a significant one for a New York inmate, and purposefully involves substantial differences in personal liberties and rehabilitative opportunities.

Petitioners' primary objection to the decision below is that due process requirements would interfere with "one of the most important tools of prison management . . . the power to decide which institution an inmate should be incarcerated in" (Pet. Brief 18). By framing the issue this broadly petitioners have argued to a question not presented by this case. Respondent takes no issue with the state's right to classify inmates for its various institutions nor with its power to move persons throughout the entire prison system. Further, as recognized by the courts below, transfers based on considerations of over-population, or budgetary and staffing constraints, as well as those that do not involve major changes in conditions, may be done summarily. It is only when the state acts to deprive an inmate of the benefits of a medium security institution because of his alleged conduct that some basic machinery to insure accurate fact-finding is required.

This Court has consistently held that where governmental action depends on findings of fact about an individual he or she must have some opportunity to be heard. *E.g. Morrissey v. Brewer*, 408 U.S. 471, 484 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Contrary to petitioners contention of inapplicability (Pet. Brief 19), due process procedures have been recognized as

uniquely adapted to ascertaining the accuracy of allegations about conduct[16].

The record underscores the importance of affording an inmate the right to be heard. Petitioner Butler admitted that as to one of the inmates transferred with Newkirk a mistake had been made, and that a more accurate investigation might have averted his transfer. The court of appeals noted that the decision to transfer Newkirk was itself premised on erroneous information in that it "was based only on third-hand reports prepared by officers who had not personally observed Newkirk's conduct, which, as it turns out, had apparently been limited to the single act of signing and passing along a union petition." (Pet. for Cert. 28).

Despite the factual predicate upon which Newkirk's transfer was based and the resultant loss to him, petitioners maintain that his transfer was not "disciplinary" but rather "administrative" requiring no due process. According to petitioners, a transfer is disciplinary only when preceded by the institution of formal "disciplinary charges" for violation of an institutional rule (Pet. Brief 25). Permitting due process rights to be labelled out of existence by prison administrators without regard to the harm involved or to the factors that precipitated the transfer guarantees arbitrary and

[16]Petitioners own concerns about avoiding assaults and disturbances–and damage actions (Pet. Brief 18-21)–would be diminished by procedures that minimize mistakes in fact-finding. Moreover, as this Court has noted, "fair treatment . . . will enhance the chances of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

irrational distinctions between inmates.[17] Indeed, as the court of appeals recently observed "After all these years of reviewing prison problems we are not too myopic to notice the distinct possibility of arbitrary, misguided or disingenuous invocation of administrative justifications for transfer." *Haymes v. Montanye*, slip op. 21, 27, n.4 (2d Cir. Oct. 4, 1974) *cert. pet. pending*, No. 74-520. And whatever the motive, the district court found in the instant case that transfer procedure at Wallkill, while termed "administrative", was as much a disciplinary measure as others for which a hearing is provided in the prison rules (Pet. for Cert. 42).

Petitioners' further objection that even minimal procedures prior to transfer may "be detrimental to institutional safety and security" is belied by their own practices (Pet. Brief 24). The usual transfer procedure at Wallkill, as followed in this case, is to first remove the inmate from general population and place him in one of the locked isolation rooms. If necessary, a hearing could be held at this stage without threat to institutional security. In fact, Butler acknowledged that most involuntary transferees from Wallkill are presently given notice of charges and a hearing, apparently without resultant difficulty.

[17]Respondent does not take issue with petitioners' need for different rules for different institutions, nor with their "prosecutorial" discretion to decide whether to charge a violation of those rules in any particular case. What is impermissible is to allow these decisions, based on penological and administrative considerations, to also define the scope of an inmate's constitutional rights.

The practice in the federal prison system is also instructive. Pursuant to a regulation covering all federal institutions, persons transferred in response to a wide variety of activities must be afforded due process.[18] The regulation lists 63 different activities, ranging from assault and escape, to refusing a program assignment and being unsanitary or untidy.[19] It requires at least 24 hour notice of charges, the services of a staff member to represent the inmate, the presence of the inmate at the hearing, the calling of witnesses, the preparation of a written record inculding the reasons for any sanctions and the evidence relied on, and three levels of appeal.[20]

These existing practices demonstrate that affording due process prior to transfer does not present real security problems.[21] Nor will it create "a formidable administrative burden." (Pet. Brief 22). During a year and a half period, only eighteen persons were

[18]Bureau of Prisons, Policy Statement: *Inmate Discipline, No. 7400*, 5C (10-4-74).

[19]*Id.* at 5-7.

[20]*Id.* at 10-11, 14. Contrary to petitioners' suggestion concerning disclosure of confidential information (Pet. Brief 25), respondent does not contest the balance struck by this Court in *Wolff v. McDonnell, supra*, and *Morrissey v. Brewer, supra*, when deciding how much process is due a convicted person prior to imposition of grievous loss.

[21]In emergency situations, even these procedures may be delayed until after transfer (Pet. for Cert. 29). The existing practices in New York State and federal prisons also demonstrate that the relevant statutes in these jurisdictions do not require summary transfers, or even indicate that they are preferable as suggested by petitioners (Pet. Brief 22-23).

involuntarily removed from Wallkill, and most of them were afforded hearings. Given the small number of transfers which would be affected by the holding below,[22] and the existence of hearing mechanisms in all facilities which presently handle large numbers of disciplinary infractions, petitioners would not be burdened by affording minimal due process.

II.

THIS CASE IS NOT MOOT BECAUSE WITHOUT THE JUDGMENT BELOW, NEWKIRK WOULD REMAIN AFFECTED BY PETITIONERS' POLICY OF SUMMARY TRANSFER AND MIGHT SUFFER ADVERSE CONSEQUENCES BASED ON HIS SUMMARY TRANSFER.

In determining mootness, this Court has deemed the following factors relevant: 1) the likelihood that the plaintiff will be subject to a repetition of the action complained of;[23] 2) the existence of current and continuing injury as a result of defendant's past conduct;[24] and 3) the risk that the past conduct will

[22]The large numbers cited by petitioners are misleading since only a small fraction of those represent prisoners involuntarily and summarily removed to a higher security institution (Pet. Brief 22).

[23]*E.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *United States v. W.T. Grant*, 345 U.S. 629 (1953).

[24]*E.g. Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Powell v. McCormack*, 395 U.S. 486, 496-500 (1969); *Carroll v. President & Commissioners*, 393 U.S. 175 (1968).

have future collateral consequences.[25]

With respect to repetition of the conduct complained of, the instant case stands in striking contrast to *DeFunis v. Odegaard*, 416 U.S. 312 (1974). There, this Court held that petitioner's claim was moot because regardless of the resolution of the merits, respondent assured the Court that petitioner would be permitted to complete his law school education. In this case, there has never been any assurance to Newkirk that he would be afforded an opportunity to be heard prior to a transfer to a higher security institution based upon his conduct. Instead petitioners have consistently maintained, as evidenced by their refusal to sign a consent decree, that Newkirk's summary transfer was proper, and they have never indicated an intention to alter their practices with respect to this type of transfer. It was this continued adherence to past policy that justified the court of appeals' conclusion that "even after his return [Newkirk] remained subject to a new transfer at any time based on mere rumor or surmise which he had no opportunity to answer or refute" (Pet. for Cert. 30).[26]

With respect to continuing injury, a finding of justiciability in this case follows from *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974)

[25] *E.g. North Carolina v. Rice*, 404 U.S. 244 (1971); *Sibron v. New York*, 392 U.S. 40 (1968); *Papish v. Board of Curators*, 410 U.S. 667 (1973), *rev'ing on the merits* 464 F.2d 136 (8th Cir. 1972).

[26] Indeed, subsequent to Newkirk's return to Wallkill there were a number of summary transfers, and he himself was threatened with re-transfer by an assistant superintendent. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

where, despite the cessation of the conduct in controversy, the challenged governmental action continued to affect "every existing collective-bargaining agreement and [was] a factor lurking in the background of every incipient labor contract". Newkirk's attested to reluctance to engage in conduct that might lead to another summary transfer is based upon petitioners' prior actions and their continuation of the policy which led to his initial transfer. Butler's promise to treat Newkirk "fairly" and without "vindictiveness" is far too vague to be of comfort to him particularly since petitioners have always maintained that they treated him fairly. Absent a declaration of his rights with respect to petitioners, Newkirk would be required to act at his peril.

This existence of potentially adverse consequences to Newkirk's chances for parole as a result of his transfer also renders this case viable. See *Sibron v. New York*, 392 U.S. 40 (1968); *Carroll v. President and Commissioners* 393 U.S. 175 (1968). Because the transfer has not been expunged, his prison record continues to reflect petitioners' conclusion that it was necessary that he be returned to a maximum security prison. This record will be transmitted to the Parole Board when Newkirk becomes eligible for parole in July, 1975. By statute, the Board must consider Newkirk's conduct in prison and the extent to which he has responded to rehabilitative efforts (N.Y. Corr. Law §214). His return to a maximum security institution can only detract from the Parole Board's estimation of his suitability for release.

The court of appeals did not believe Butler's mere placement of a letter in Newkirk's file stating that

adverse conclusions should not be drawn from the transfer was sufficient protection. That assessment was correct because whatever Butler's good faith intendment towards Newkirk may be, other officials are free to disregard his suggestion when making decisions affecting Newkirk.[27]

In closing, we would emphasize that the relief granted in this case was declaratory only. As this Court has noted, a primary purpose of the Federal Declaratory Judgment Act is to avoid the necessity "of having to act at one's peril . . ." by enabling an individual to secure a judgment as to his rights and duties before an actual injury has occurred. *Perez v. Ledesma* 401 U.S. 82, 111-112 (1971) (Brennan, J., separate opinion); *Steffel v. Thompson,* 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring). Newkirk is so situated, and declaratory relief is essential to clarify his rights.

[27]Newkirk's recent transfer to the Edgecombe Correctional Facility in New York City also does not moot the controversy since at Edgecombe respondent is still subject to petitioner Preiser's control and can be transferred by him back to Wallkill or to one of the state's maximum security prisons at any time. Cf. *Brockington v. Rhodes,* 396 U.S. 41, 43 (1961); *Henderson v. United States,* 339 U.S. 816, 823 (1950).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

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